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PETITION FOR WRIT OF CERTIORARI
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IN THE

Supreme Court of the United States

October Term, 1970

No. Misc.

CHARLES JONES,

Petitioner,

—against—

NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

Petitioner seeks a Writ of Certiorari in order to review an order of the Court of Appeals of the State of New York, dated May 14, 1970, which affirmed an order of the Supreme Court of the State of New York, dated July 25, 1969 (32 AD 2d 1069), which in turn affirmed a judgment of the Supreme Court of the State of New York, Kings County, rendered on July 11, 1967, convicting him of Manslaughter in the First Degree and sentencing him as a third felony offender to ten to fifteen years in prison.

Jurisdiction

The jurisdiction of this Court is sought to be invoked under 28 USC § 1257(3). Petitioner contends he was denied

his rights under the Sixth and Fourteenth Amendments because of inadequacy of counsel in failing to take steps to move for suppression of evidence allegedly obtained illegally, in failing to move to suppress statements allegedly obtained illegally and for failing to make certain objections or to request specified appropriate charges of the trial Court.

Facts

Patrolman Henry Lonenhaupt was cruising in his police car at about 11:50 P.M. on May 21, 1966 when he saw a crowd near a neighborhood park. He got out of the car and discovered a man lying on his back in a semi-conscious state, apparently stabbed (14-15).* The witness identified the body at the morgue the next day. It was Walter Young (15-16).

Clarance Edward Smith was a friend of petitioner and was in the Adelphi Bar that evening when the petitioner and his wife, Viola, had an argument. Petitioner struck her, knocking her to the ground (20-21). The defendant went over to the fallen woman and an argument ensued between him and petitioner but it was broken up before blows were struck. Petitioner and his wife left with the decedent exiting shortly thereafter (23-24).

The witness said he later was outside the bar when petitioner returned alone and then the decedent, Walter Young, also came back (25). Petitioner and Young began to talk and then went over to a park bench across the street where they continued conversing (26).

A fight began and the decedent had petitioner down on the ground when the witness ran over and pulled him off.

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* Numerical references are to the original minutes of trial.

Petitioner arose but the decedent pushed him and ran away (28).

Petitioner pursued Young, finally caught him, but the witness could not see what happened (30). He did see Young on the ground however, bleeding from the abdomen (31).

Leroy Ford was also in the bar that night and testified similarly regarding the affair in the bar between petitioner and his wife and the events outside the bar (40-68). He also said that he too ran after Young and he caught him first and hit the decedent. Then petitioner came and also struck Walter Young. As they were walking back, petitioner said he had stabbed Young but because Ford did not believe it he walked back. The decedent was on the ground, bleeding (47).

Mr. Ford said he had not seen where petitioner struck Young but he did see Young hit and grab himself with both hands (48).

As they were walking back he saw petitioner with a small leather knife case in his hand and he also saw him put the knife into it and place the case in his belt (51). The witness then said he had not seen the blade, only the handle (51-52).

On cross-examination, Ford acknowledged convictions for possession of a weapon and for stealing hubcaps in Virginia (59, 61).

Dr. Milton Wald established the cause of death as a stab wound of the chest (88) and Detective Higgins of the Photo Unit identified pictures of the scene of the crime (90-91).

Detective James Porter reached the park and saw the decedent bleeding on the sidewalk (92-93). Petitioner was brought into the precinct about 1:00 A.M. by detectives

from the Homicide Squad and was turned over to the witness along with some clothing (94). The clothes were analyzed by the medical examiner because of certain stains on them (94-95). The shirt and jacket were offered into evidence without objection (95).

On cross-examination the witness was asked if he had a conversation with petitioner about the clothing and the answer was yes (96). The clothes had been brought by a Detective and the petitioner did not leave the precinct to the witness' knowledge (96-97).

On recross, the witness said that petitioner had told him he had worn the clothes earlier that evening when he was at the Adelphi Bar (98).

Dr. Alexander S. Wiener, of the Medical Examiner's Office, tested the stains on petitioner's clothes and found them to be blood of the same type of the decedent, Type A (102, 103).

Samuel Thomas, an inmate at the Queens House of Detention, said that petitioner had been there too in October or November, 1966, and admitted to him that he had committed the crime but he would have witnesses to make it seem like a witness against him had done it (107-110).

The People rested and petitioner presented his first witness, his wife, Viola Jones. She described the fight in the bar and said that when petitioner knocked her down she bled and stained her coat (127). They went back home and when they embraced in an effort to make up, petitioner got blood on his shirt, so he put on different clothes (128, 138). They went back to the bar but she went to a restaurant to eat and left petitioner outside the bar (128).

The witness did not see her husband again and when she returned home, there were two detectives and Ford looking for him. Then petitioner came and he was arrested and taken to the precinct (129). Later on the two detectives returned to pick her up. One saw the clothes on a chair and asked if they were her husband's. She replied that they were and he took them with him (129).

Mrs. Jones said that the blood on her husband's clothes was hers (130) and that petitioner did not possess a knife (134).

Petitioner, Clarence Jones, also testified. He admitted to two felony convictions (141-142) and paralleled his wife's testimony regarding the fight in the bar. He started to fight with a man who had been bending over his wife but it was broken up quickly and he took her home (144). He got her blood on his clothes when he embraced her at home, changed and went back to the bar while his wife went to eat (144).

Petitioner said he got into a fight on the street corner, he really could not remember very clearly, the other fellow pushed him and ran away. Leroy, his friend, ran after the decedent and he, Jones followed. When he got to the park he started to swing but Leroy said "Come on man. I got him" (146). Then Leroy went back to see if the decedent had any money and petitioner returned to the stoop (146). He met one of his wife's friends and because he was drunk went to her apartment to lie down. His wife came up later, then went home and he went home later to find the detective and Ford waiting for him (147).

Petitioner was taken to the precinct and questioned (148). He said he had changed clothes and the detective took him

home, obtained his shirt and jacket and also picked up his wife (148). He never had a knife and did not commit the crime (149). He also denied making any admission to the convict, Samuel Thomas (164).

The defense rested and the People presented one rebuttal witness. Dr. Jane Buehrer, a laboratory director, who testified that she tested Viola Jones' blood the day before and it was AB Positive (167). She said that if the blood on petitioner's clothes was Type A, as it was (102) it could not be the blood of Viola Jones (169).

Both sides rested and after summation, the Court charged the jury. No instruction regarding accomplice testimony was made and the case went to the jury only on charges of Manslaughter in the First and Second Degrees (214-215, 219).

There were no exceptions taken or requests to charge made (248).

POINT I

Petitioner's right to counsel was not shown to have been violated. The trial below, where counsel was not assigned but retained, was not such a farce so that the Courts should have become involved.

The gist of petitioner's argument in the Appellate Division was that his rights under the Fourth Amendment were violated because of an illegal search and seizure, that the principle of *People* v. *Mussenden*, 308 N.Y. 558 was violated because the Court removed certain lesser counts from the jury's consideration and that petitioner was illegally interrogated at the precinct, an incident which was also the basis for the subsequent search. In addition, petitioner

cited as error the failure of the Court to charge the jury that a major witness against him could be considered an accomplice.

Respondent argued that on the law *Mussenden* was inapplicable, that the record was insufficient to conclude that either the interrogation or search violated petitioner's rights and that the complete lack of objections, exceptions, requests to charge and the failure to move to suppress evidence precluded him in any event. In petitioner's reply it was argued that the lack of such objections should not preclude a reversal because the rights to be protected were constitutional and so fundamental that the lack of objections did not matter.

The Appellate Division in its majority opinion disposed of the *Mussenden* argument on the merits by holding that there was no reasonable view of the facts which would have permitted a connection of the lower crime and an acquittal for the higher one. The Court also pointed to the lack of exceptions or objections and then said that while it could reverse in the interests of justice, it would decline to do so because of the overwhelming proof of guilt.

In the Court of Appeals, petitioner based his entire argument on an incompetence of counsel contention.

Petitioner argues even though counsel was retained rather than assigned, that the representation afforded him was so incompetent and ineffective that he was denied the effective assistance of counsel. It is of course not difficult to second guess counsel and as of late it has become quite fashionable to throw the entire burden of any errors discovered after hindsight on the shoulders of the trial attorney.

Thus, the courts have increasingly become forums to hear grievances and complaints of disgruntled prisoners and defendants who have no one to blame but their lawyers for the position they find themselves in. It is of course unthinkable that they would hold themselves responsible inasmuch as it was they, not their attorneys who committed the crimes involved. This was a fear expressed by the Court of Appeals in *People* v. *Brown*, 7 N.Y. 2d 359, 361 and was also alluded to in *People* v. *Portner*, 34 Misc. 2d 769, aff'd. 18 A.D. 2d 1054.

It is partly because of the unwillingness to be put in the middle of disputes between clients and attorneys that the doctrines promulgated in *People* v. *Tomaselli*, 7 N.Y. 2d 350 and *People* v. *Brown*, 7 N.Y. 2d 359 came to pass. It is only where counsel is so unfit that the trial becomes a "farce and mockery of justice" that Courts will step in.

Another reason for the evolution of the *Tomaselli-Brown* doctrine is also applicable here and should also lead this Court to refrain from interfering with the result below. Where, as here, trial counsel is retained rather than assigned counsel, there is no action on the part of the State which can be said [illegible] used to be the error. The duty of the trial court to take some action is much greater where it bears a portion of the responsibility because it assigned the attorney. Where the choice of attorney is that of the defendant, no "action on the part of the State" is involved and there is no deprivation of due process of law. *People* v. *Hernandez*, 8 N.Y. 2d 345, cert den. 366 U.S. 976.

The right to a lawyer does not include the right to infallible counsel or even counsel guaranteed not to be negligent or make an error in judgment. *People* v. *Murdaugh*, 13 A.D. 2d 509, cert. den. 368 U.S. 959. Not every attorney or even judge

can be presumed to know all the law and unless the trial is a complete sham, appellants should not be allowed to complain about the attorneys they personally chose. *People* v. *Portner*, 34 M. 2d 769, aff'd. 18 A.D. 2d 1054. Even the actual misrepresentations of an attorney have been held not to be actionable. *People* v. *Meyers*, 16 A.D. 2d 704; *People* v. *Robertson*, 35 M. 2d 166.

The record in this case does not indicate that the trial was a travesty of justice and the actions of counsel may have been intentional and part of his trial strategy.

The officer was never asked if he had warned petitioner of his rights and it may very well be that the lawyer knew that such warnings had been given and to bring that fact out would enhance the police officer's integrity because his testimony would be supported. Petitioner wrongfully assumes that the interrogation was in violation of his rights and that is simply not borne out by the record in this case.

The failure to move regarding the search and obtaining of petitioner's clothes may have also been intentional and intelligent. The attorney may have judged that a valid consent occurred at the precinct and in that event the absence of a warrant would be unimportant. The other complained of failures regarding the *Mussenden* doctrine and the accomplice contention really have no merit and the questions are so close anyway that the lawyer's action are clearly matters of judgment which should not be interfered with.

Of course, even if petitioner's rights were violated and the representation did fall below the standards required, still, a reversal does not automatically follow. The Appellate Division specifically found overwhelming proof of guilt and intentionally refused to exercise its discretion in the interests

of justice. Another witness, Samuel Thomas, an inmate at the Queens House of Detention also testified and said petitioner admitted the crime to him (107-110). The testimony of petitioner's wife, that it was her blood on the clothes (144) was effectively counteracted by a rebuttal witness, Dr. Jane Buehrer, who said that the blood type found on the clothes was different from that of the wife and could not be her blood (167-169). There was not much doubt that petitioner had the knife and the inconsistency in his testimony as well as that of his wife apparently led the jury to disbelieve his version of the events. Since the proof evidenced a very strong case, the inferior representation, if that be assumed, might still not have been prejudicial. *Chapman* v. *California*, 386 U.S. 18; *Harrington* v. *California*, 395 U.S. 250.

Petitioner discusses the law of search and seizure generally, as well as the governing principles with reference to interrogation problems, and respondent must essentially agree with the legal discussion in his brief. On the other and, even if it does, how it can be urged for the first time hand, respondent cannot see how it applies in this case, at this late stage of the proceedings.

After petitioner was arrested he was taken to the precinct and petitioner argues that he was interrogated without the necessary *Miranda* warnings having first been given.

Petitioner then argues that an admission was elicited that he had changed his clothes earlier that night and because of that the police took him back to his house and obtained his clothes without a search warrant.

It seems to respondent that at the outset, two things are clear. First, there is absolutely no indication in the record whether petitioner was or was not warned of his rights because the questions were never asked of anyone, and,

second, the statement that petitioner acknowledged ownership of the clothes was brought out on cross-examination and re-cross examination of a prosecution witness (93, 98) and by petitioner himself (143).

In addition, and most important, no objection was made to the receipt of the clothes either when they were offered (95) or when counsel was given an opportunity to be heard on the jury's right to have any exhibits (243). Also no exceptions or requests to charge were interposed (243). In short, no statements were introduced by the People and neither the issue of constitutional warnings or even the legality of the seizure of the clothes was raised by petitioner or gone into by the court.

It is possible that the warnings were given and that the obtaining of the clothes was with petitioner's consent. This record does not disclose what the facts were because no action by petitioner was taken to develop those issues. No motions, either prior to or during trial were made and the evidence was in no way objected to. Since the issue was not before the Court, and the facts were not adduced respondent cannot see how petitioner can assume that the *Miranda* warnings were not given. It is just as fair to assume that they were.

Motions regarding allegedly illegally obtained evidence are governed by Sections 813(c), (d) and (e) of the Code of Criminal Procedure and it has been held that unless the statutes are complied with and the applications are made before or in certain cases during trial, the constitutional objection is waived. *People* v. *Peterson*, 25 A.D. 2d 437. When such is the case, and the motion is not made, it cannot be urged on appeal for the first time. *People* v. *Edmonds*, 26 A.D. 2d 592; *People* v. *Britton*, 26 A.D. 586. The

same rules should of course apply to admissions which are claimed to be tainted. Section 813-(g)-(h)-(i), Code of Criminal Procedure. When the Court of Appeals held in *People* v. *McQueen*, 18 N.Y. 2d 337, that *Miranda* v. *Arizona*, 384 U.S. 436 was not retroactive in New York, it obviously dealt with a situation where it could be said that the objection would not be expected to be raised since *Miranda* had not been decided, whereas here, where *Miranda* was already the law, there is more reason to hold that the failure to object or raise the issue should be controlling. It also is a consideration that in fairness to the trial court it cannot be expected that a ruling would be forthcoming when the issues were not called to its attention.

Unless this Court will hold that the representation afforded was so lacking in basic essentials that it in and of itself dictates a reversal, the failure to preserve the issues or take procedural opportunities available should be considered matters of judgment and petitioner should be bound thereby. The same is true where petitioner's other complaint is concerned, the failure to charge the jury on accomplice testimony. It must be assumed that had defense counsel felt that an issue of this nature was in the case, he could have requested it be submitted to the jury. The indication that he did not regard it as an issue in the case can be gleaned from the fact that the charge was satisfactory (248). The facts of this case really do not show how a jury could have considered Ford an accomplice in any event. Ford put the blame on petitioner and petitioner reversed the process. No one claimed the two worked together and petitioner's evidence tended to prove that Ford did the stabbing without his complicity. Conversely, it was the People's case that petitioner was the culprit. In no view of the facts would either be an accomplice.

Even if the issue was present and had petitioner requested and obtained the charge, there still would be little reason to disturb the judgment because ample corroboration existed. The confession to the convict, Samuel Thomas was sufficient and so was the blood-stained clothes and the admission of ownership adduced by the defense itself on cross-examination.

POINT II

The case was properly submitted to the jury on the manslaughter counts alone.

Petitioner argues that the trial Court should have submited the crime of assault to the jury and he relies on *People* v. *Mussenden*, 308 N.Y. 558; *People* v. *Malave*, 21 N.Y. 2d 26 and other similar cases. Aside from the incompetence of counsel issue, respondent takes the position that even if the lawyer had asked for the lesser charges, the trial Court should have properly refused such a request anyhow. The Appellate Division agreed because in its opinion it held that by no view of the facts could petitioner be guilty of the lesser crimes and innocent of the higher one.

Respondent is well-aware of the cases cited by petitioner and the general principles enunciated are not doubted. The rule, however, does not always require any possible lower crime to be submitted but it also stands for the principle that where by no fair interpretation of the facts could the lower degree be supported, the duty to submit those degrees does not exist. *People* v. *Mussenden*, *supra*. In the case at bar, the lower degree was not required to be submited because it was the killing that the jury was dealing with, not some other unimportant blow and if they found

petitioner not to have stabbed Walter Young they would have acquitted. The fact that they could have found him guilty of a separate assault is irrelevant because the death was the issue.

Respondent also agrees that the failure to request submission of the lower charge does not absolutely absolve a trial court in a proven case from the duty of charging lower degrees but the failure to make the request does indicate that counsel did not think the matter important. Thus, the failure to request the charge in a clear case like this one, where the issue really was not involved, should be controlling.

The failure should also be given more weight where, as here, the Court specifically took it away from the jury, thus putting counsel on notice (214-215), rather than what usually happens, and that is, that the Court merely fails to charge it without it being in the indictment in the first place. This case shows more reasons to rely on counsel's actions because it was less of an oversight and more of an intentional decision.

In any event, respondent cannot see where any constitutional rights are involved in this particular issue or in the accomplice issue. Corroboration is not constitutionally required and in fact is not even necessary in federal proceedings. These matters seem to be strictly questions of state law alone.

CONCLUSION

The petition for the writ of certiorari should be denied.

Dated: Brooklyn, New York
December, 1970

Respectfully submitted,

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